

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting application for conveyance of Federally owned mineral interests. OR 32757.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

An application for conveyance of Federally owned mineral interests to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), is properly rejected where the mineral interests are the subject of a valid minerals site right-of-way.

2. Administrative Authority: Generally -- Rights-of-Way: Federal Highway Act

In granting a right-of-way over public lands pursuant to the Federal Aid Highway Act, 23 U.S.C. § 317 (1982) (formerly 23 U.S.C. § 18 (1946)), the Secretary of the Interior does not give up administrative authority over the lands subject to the right-of-way.

APPEARANCES: Sydney L. Chandler, Esq., Coos Bay, Oregon, for appellants.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Kenneth L. Ingram, et al. 1/ have appealed from a July 24, 1985, decision of the Oregon State Office, Bureau of Land Management (BLM), rejecting their application for conveyance of Federally owned mineral interests. Appellants' application was filed on August 28, 1981, under section 209 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719 (1982), for conveyance of the Federally owned mineral interests in sec. 29, NW 1/4 NE 1/4, T. 28 S., R. 12 W., Willamette Meridian, Oregon.

1/ The other appellants are Beverly Ingram, Floyd Ingram, and Billie Ingram.

The land was originally patented to John F. McKee by patent No. 1126550 on July 6, 1949. 2/ The patent reserved to the United States all rock in the land together with the right of the United States and its permittees and lessees to enter the land and remove the rock.

By grant of September 7, 1950, the Oregon State Highway Commission received a material site right-of-way (ORE 0454) to the land in accordance with section 17 of the Federal Aid Highway Act of November 9, 1921, 23 U.S.C. § 18 (1946). The right-of-way granted the right to enter upon the land and remove rock for Federal aid highway purposes.

In their application, appellants stated that their projected use of the lands would be for timber growing and limited grazing and that the rock had little or no commercial value. They included a letter dated April 13, 1981, from an official of the Coos County, Oregon, Highway Department, stating that Coos County had discontinued quarrying the rock because of its poor quality and the expense involved. 3/

In the course of reviewing the application, BLM contacted the Oregon State Highway Division which responded by letter dated June 18, 1985, stating that the site was not currently being used but that it had potential as a future source of rock, and that the State wished to retain the right-of-way for anticipated future needs.

In its decision of July 24, 1985, BLM rejected the application because the lands were subject to the State's material site right-of-way. The decision stated in part:

Under the law the United States has no authority to terminate the right-of-way, and it must remain in effect until the State gives notice that the material site is no longer needed. Therefore, the application for conveyance of the reserved mineral interest filed by the Ingrams must be rejected.

BLM also authorized a refund of \$ 1,360, remitted by appellants to cover BLM's review of their proposed plan of operations.

In their statement of reasons, appellants assert that record title to the rock is in the United States and that Oregon has only a permissive interest. Appellants contend that the rock has no commercial value and that they would accept a conveyance subject to the State's right-of-way. Appellants state that they expended substantial sums in pursuing the application and that BLM's rejection thereof is grossly unfair and inequitable.

2/ McKee deeded his interest to Margaret M. Acheson by warranty deed dated Feb. 17, 1973. The Ingrams received the land from Acheson by warranty deed dated Mar. 1, 1973.

3/ A free use permit (ORE 015448) was granted by BLM to Coos County on July 2, 1964. The permit was renewed on July 1, 1969 and expired on June 30, 1974.

Section 209(b) (1) of FLPMA provides:

The Secretary, after consultation with the appropriate department or agency head, may convey mineral interests owned by the United States where the surface is or will be in non-Federal ownership, regardless of which Federal entity may have administered the surface, if he finds (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development.

43 U.S.C. § 1719(b)(1) (1982). See also 43 CFR 2720.0-2.

[1] BLM correctly rejected the application because the mineral interests applied for were already conveyed and not available for conveyance under section 209(b)(1) of FLPMA. A material site right-of-way created under 23 U.S.C. § 18, now 23 U.S.C. § 317 (1982), effectively renders the land unavailable for further appropriation or entry. State of Alaska, 62 IBLA 187, 192-93 (1982); Ralph Memmott, 61 IBLA 116 (1982); Sam D. Rawson, 61 I.D. 255 (1953). See Schaub v. United States, 103 F. Supp. 873 (D. Alaska 1952), aff'd, 207 F.2d 325 (9th Cir. 1953).

[2] Appellants correctly assert that record title to the materials subject to the right-of-way is in the United States. A material site right-of-way does not transfer title to the lands. Title to and jurisdiction over the lands remains with the Secretary, who retains the authority to review the present and past circumstances of the grant. Southern Idaho Conference Association of Seventh Day Adventists v. United States, 418 F.2d 411 (9th Cir. 1969); State of Alaska, 46 IBLA 12, 17-18 (1980). While no cancellation authority is expressly created by 23 U.S.C. § 317 (1982), the Secretary, in promulgating regulations implementing the Act, has recognized an inferred authority to cancel a material site right-of-way. State of Alaska, Department of Highways, 20 IBLA 261, 268, 82 I.D. 242, 244 (1975). The regulation presently in effect, 43 CFR 2803.4, provides in pertinent part:

(b) The authorized officer may suspend or terminate a right-of-way grant or temporary use permit if he determines that the holder has failed to comply with applicable laws or regulations, or any terms, conditions or stipulations of the right-of-way grant or temporary use permit or has abandoned the right-of-way.

Thus, the decision appealed from is in error insofar as it indicates that the United States has no authority to terminate the right-of-way. The authorized officer does have the discretionary authority to terminate a right-of-way; implicit in that authority is the authority to review the present and past circumstances of the grant. As we noted in State of Alaska, 46 IBLA 12, 18 (1980) "[i]t would be contrary to the public interest if the Department could not correct an unauthorized action or an action contrary to law." The record before us, however, indicates that material site right-of-way ORE 0454 is a

valid right-of-way and does not warrant termination. We therefore conclude BLM properly rejected appellants' application for conveyance of Federally owned mineral interests. 4/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

John H. Kelly
Administrative Judge

We concur

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge.

4/ Appellants assert that because BLM advised them to file their application and they expended substantial sums of money, a denial would be grossly unfair and inequitable. Absent a showing of affirmative misconduct by a BLM employee, the Government is not estopped from denying appellants' application. See United States v. Ruby, 588 F.2d 687 (9th Cir. 1978); Ward Petroleum Corp., 93 IBLA 267 (1986).

